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STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Order of Conditional License and Order to Forfeit a Fine Issued to Roxann Menden	<b>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</b>
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Appearances: Jeanne Anderson, Assistant Scott County Attorney, on behalf of the Department of Human Services (Department); Roxann Menden on her own behalf (Respondent).

The hearing was initially scheduled for September 10, 2009, pursuant to the Notice of and Order for Hearing issued on June 12, 2009. The Respondent failed to appear on that date. The Assistant County Attorney submitted documentation and requested an Order affirming the proposed actions. On September 14, 2009, the Respondent contacted the Assistant County Attorney and the Administrative Law Judge, stating that she had checked in with the Scott County Court Administrator on September 10, 2009, but was told that she had no hearing on the court calendar for that date. She did not attempt to contact the Assistant County Attorney or the County Licensing Office. The hearing location in the Government Center was included on the Notice and Order for Hearing. In light of the Respondent's apparent confusion, the Administrative Law Judge agreed to reschedule the hearing and the parties were so notified.<sup>1</sup> The hearing was held as scheduled on October 1, 2009, and the hearing record closed on that date.

### STATEMENT OF THE ISSUES

1. Did the Department correctly impose a fine of \$800 for the Respondent's failure to have a background check for one helper and Sudden Infant Death and Shaken Baby Syndrome training for three helpers?
2. Did the nature, severity and chronicity of the Respondent's violations of the child care licensing rules support the Department's decision to issue a Conditional License?

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<sup>1</sup> Letter to Assistant County Attorney and Respondent, September 15, 2009.

The Administrative Law Judge concludes that the fine of \$800 and the decision to issue a Conditional License should be affirmed.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. From 1992 through 1999, the Respondent held a license to provide child care in her home. In 2000, Scott County's Child Care Licensing Program (the County) received a call that the Respondent was providing unlicensed child care in her home. The County sent the Respondent a letter, but she did not respond.<sup>2</sup>

2. In August 2007, the County received another call that the Respondent was providing unlicensed child care. The Prior Lake Police went to the Respondent's home, determined that she was providing unlicensed child care, and issued a citation. Thereafter, the Respondent contacted the County to initiate licensing.<sup>3</sup>

3. The Respondent completed the licensing application, and on April 8, 2008, Laurie Wolf, a County licensing worker and Respondent's case manager, scheduled a licensing visit. At that visit, Ms. Wolf gave the Respondent information, conducted a walk-through of the home, and reviewed a number of the child care licensing requirements with the Respondent. In particular, Ms. Wolf discussed the use of substitute caregivers and gave the Respondent a goldenrod-colored sheet with requirements for the provider on one side and requirements for those who might assist with care on the other side. Ms. Wolf discussed the need for background studies and training for Sudden Infant Death (SIDS) and Shaken Baby Syndrome (SBS). Ms. Wolf also left a blue sheet with information about the staff-to-children ratios and a copy of the Department's child care licensing rule.<sup>4</sup>

4. During the licensing visit, Ms. Wolf and the Respondent discussed the use of substitute caregivers, and the Respondent stated that she did not intend to use them at that time. She mentioned the possibility that, in the future, her husband might help her provide care and that she might seek to increase her license capacity. Ms. Wolf discussed and wrote down the steps required for substitutes or to add the Respondent's husband as a caregiver.<sup>5</sup>

5. The County issued the Respondent a C-2 Group Family Day Care license, which allowed her to care for up to 12 children, with no more than 10 under school age. Of those 10, no more than two could be infants or toddlers, and only one of the two could be an infant.<sup>6</sup>

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<sup>2</sup> Testimony (Test.) of Laurie Wolf, child care licensing worker.

<sup>3</sup> Test. of Wolf; Test. of Respondent.

<sup>4</sup> Test. of Wolf.

<sup>5</sup> Exhibit (Ex.) 1.

<sup>6</sup> Minn. R. 9502.0367 C(2).

6. An “infant” is a child who is at least six weeks of age and less than 12 months of age.<sup>7</sup> A “toddler” is a child who is at least 12 months old but less than 24 months old.<sup>8</sup> A “preschooler” is a child who is at least 24 months of age up to the age of being eligible to enter kindergarten within the next four months.<sup>9</sup> A “school age” child is eligible to enter kindergarten within the next four months, up to age 11.<sup>10</sup>

7. The C-2 license was issued for one year, and the County was not aware of any problems with the Respondent’s operation during that year.<sup>11</sup>

8. About two months prior to the expiration of the license, Ms. Wolf sent out a license renewal package. The Respondent completed the required information, including a roster of the children in care, and returned it to Ms. Wolf. Ms. Wolf also sent out evaluation forms to parents of the children in care. In reviewing the roster, which included the names and birthdates of the children in care, and the parent responses, Ms. Wolf noted that the Respondent appeared to be caring for more children than permitted under her license. Ms. Wolf contacted some of the parents to verify birthdates and the days of the week and the hours of care for the children. Based on her review, she determined that the Respondent was caring for seven children under the age of two, well above the license limit of two children under the age of two.<sup>12</sup>

9. On March 24, 2009, Ms. Wolf met with her supervisor about her concern that the Respondent was exceeding her licensed capacity. Ms. Wolf and her supervisor agreed that Ms. Wolf would issue a Correction Order and request that the Department issue a Conditional License to the Respondent.<sup>13</sup>

10. On March 25, 2009, Ms. Wolf went to the Respondent’s home to conduct a relicensing visit. Although the visit ordinarily occurs during the month prior to the renewal date, the license holder is not informed of the exact date of the visit. On that day, the Respondent had left home for about four hours to take her daughter to visit a college. The Respondent’s adult daughter, Tammy Menden, was in charge of the children in care. The Respondent’s niece, Katie, was helping with the children, and Katie’s friend, Tiffany, was also present to play with the children. Ms. Wolf spoke with the Respondent on the telephone and arranged to return on another day.<sup>14</sup>

11. Ms. Wolf noted the names of the children in care that day, and was concerned that there were no background studies for Katie and Tiffany or verification that Tammy, Katie and Tiffany had SIDS/SBS training.<sup>15</sup>

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<sup>7</sup> Minn. R. 9502.0315, subp. 16.

<sup>8</sup> *Id.*, subp. 30; Minn. Stat. § 245A.02, subd. 19 (d).

<sup>9</sup> Minn. R. 9502.0315, subp. 22; Minn. Stat. § 245A.02, subd. 19 (e).

<sup>10</sup> Minn. R. 9502.0315, subp. 28; Minn. Stat. § 245A.02, subd. 19 (f).

<sup>11</sup> Test. of Wolf.

<sup>12</sup> Test. of Wolf.

<sup>13</sup> Test. of Wolf; Ex. 2.

<sup>14</sup> Test. of Wolf; Test. of Respondent; Ex. 3 (Ms. Wolf made the hand-written correction to the date of the visit).

<sup>15</sup> Test. of Wolf; Ex. 3.

12. Ms. Wolf subsequently learned that the verifications for Tiffany were in another child care provider's file. However, there was no background study for Katie and neither Tammy nor Katie had received SIDS/SBS training.<sup>16</sup>

13. On March 30, 2009, Ms. Wolf returned to Respondent's home to conduct the licensing visit. On that day, the Respondent had 13 children in care, 11 were under school age and three were under the age of two. The Respondent asked whether she might be given a variance to care for children above the level permitted by her license. Ms. Wolf explained that, even with a variance, there were too many children. Later in the visit, the Respondent and Ms. Wolf discussed the capacity and the possibility of a C-3 license, which permits care of up to 14 children. Ms. Wolf explained that a C-3 license requires a second caregiver to be present at all times that 14 children are present. The Respondent mentioned that her husband had helped with child care during the winter months, and it was possible that he could assist in the future. Ms. Wolf explained the requirements for a second caregiver.<sup>17</sup>

14. Ms. Wolf issued a Correction Order based on the violation of the capacity limitation, the use of a helper who lacked the necessary background study (Katie), and lack of SIDS/SBS training (husband, Katie and Tammy).<sup>18</sup> She also left a list of children whose forms were missing or needed updating.<sup>19</sup>

15. During the visit, Ms. Wolf notified the Respondent that she had requested that the Department issue a Conditional License because the Respondent had exceeded her capacity, and that the licensing workers would increase their visits to verify that the Respondent remained within the capacity and age distribution requirements of her license. Ms. Wolf told the Respondent that she would have two weeks to bring the number of children in her care to the level allowed by her license.<sup>20</sup>

16. The Respondent and Ms. Wolf also discussed appropriate supervision of preschoolers, and the need for additional crib checks, service of the fire extinguisher and use of bleach water. None of these items were included on the Correction Order.<sup>21</sup>

17. On April 1, 2009, Ms. Wolf called the Respondent to review the plans for lowering the number of children in care. Once again, Ms. Wolf and the Respondent discussed the requirements for a C-3 license. The Respondent also inquired whether she might receive a variance to care for an additional infant, but Ms. Wolf told her that, since the County was recommending a Conditional License, it would not grant a variance. The Respondent also expressed concern that she was being monitored unfairly and that other child care providers were allowed to exceed capacity three times prior to receiving a Correction Order. Ms. Wolf acknowledged that exceeding capacity did not always trigger a Correction Order, but pointed out that the Respondent had far

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<sup>16</sup> Test. of Wolf.

<sup>17</sup> Test. of Wolf; Ex. 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Ex. 4 (Correction Order, 3/30/09).

exceeded the limit for children under the age of two, which endangered all of the children in care.<sup>22</sup>

18. Also on April 1, 2009, the County wrote to the Department, recommending that it issue the Respondent a Conditional License because she had exceeded her capacity and age distribution restrictions, and had failed to obtain the necessary background studies and documentation of SIDS/SBS training. In the letter, the County also mentioned that the Respondent had previously been cited and fined for operating without a license. It suggested possible conditions to more closely monitor the number and ages of children in care and increase its unannounced visits. It did not recommend a fine.<sup>23</sup>

19. On April 2, 2009, the Respondent notified the parents of the children in her care that she had been caring for more children than permitted under her license, that she would need to reduce her numbers by April 14 or risk losing her license, and that her rates would be raised.<sup>24</sup>

20. On April 22, 2009, Ms. Wolf conducted a monitoring visit. On that date, there were ten children in care, including nine under school age and three under the age of two, one more than permitted under the license. The Respondent explained that two of the children would be leaving in the next two weeks and a third child would reach school age on May 10. She also explained that her husband was out of work so that she needed to take additional children. Ms. Wolf asked to check the bedrooms to be sure that there were no additional children in those rooms, but the Respondent refused and asked the children who were present whether there were any other children sleeping. The children concurred that none were sleeping. The Respondent was clearly annoyed with the disruption to her care of the children and she perceived that Ms. Wolf did not trust her and was harassing her with frequent visits. Ms. Wolf stated that, under the licensing rules, she could check the bedrooms. The Respondent would not consent and requested Ms. Wolf's supervisor's name and number. Ms. Wolf provided them and left the home.<sup>25</sup>

21. Following this licensing visit, at Respondent's request, she was assigned to a new licensing worker.<sup>26</sup>

22. As part of the relicensing process, the County sent out evaluation forms to parents of the children in Respondent's care. A summary of six responses showed that the parents were very satisfied with the Respondent's care. The responses also corroborated that the Respondent's husband and daughter had assisted in the past year.<sup>27</sup> The Respondent is proud of the relationships she has formed with the children and their parents. She keeps the parents well-informed about daily activities, the

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<sup>22</sup> Test. of Wolf; Ex. 5.

<sup>23</sup> Test. of Wolf; Ex. 6.

<sup>24</sup> Ex. 10; Test. of Respondent.

<sup>25</sup> Test. of Wolf; Test. of Respondent; Ex. 7.

<sup>26</sup> Test. of Wolf; Test. of Respondent.

<sup>27</sup> Ex. 11.

children enjoy being at her home, and she believes that she carefully supervises all the children and would never put them at risk.<sup>28</sup>

23. On May 4, 2009, Department staff member Mary Larson called Ms. Wolf to discuss the alleged violations and the Department's position that a fine should be assessed against the Respondent for the missing background check and missing verification of SIDS/SBS training. Ms. Wolf clarified that there was no background check for Katie, and that the Respondent had no record that Tammy, Katie and Respondent's husband had completed SIDS/SBS training.<sup>29</sup>

24. On June 2, 2009, the Department issued an Order to Forfeit A Fine and Order of Conditional License. The Respondent was fined \$200 for one missing background check and \$200 for each of the three violations of the SIDS/SBS training requirement, a total of \$800. The Order of Conditional License was issued for the violations of the capacity and age distribution limits and failure to submit a background study for a helper and the required documentation of SIDS/SBS training. The Department issued a Conditional License for one year, subject to the following conditions:

1. You follow and comply with all applicable Minnesota Rules and Laws.
2. No variances to age distribution or capacity will be granted during the conditional period.
3. No drop-in care will be allowed during the conditional period.
4. You submit daily attendance records to Scott County on a monthly basis....The Records must show the name and the date of birth of each child in care and the days and hours they were in your care.
5. You must submit a detailed written plan to Scott County...describing how you will ensure that background studies are submitted as required, and that caregivers are trained in SIDS and Shaken Baby Syndrome before caring for infants.
6. You must receive prior approval from Scott County prior to enrolling any new children in your family child care.<sup>30</sup>

25. The Respondent was also required to document that all of the parents had the opportunity to review the Order. The Order included the Respondent's right to appeal the fines and the Conditional License.<sup>31</sup>

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<sup>28</sup> Test. of Respondent.

<sup>29</sup> Test. of Wolf; Ex. 8.

<sup>30</sup> Ex. 9 at 5.

<sup>31</sup> Ex. 9.

26. The County conceded that the Respondent's appeal of the Order to Forfeit a Fine and Order of Conditional License was timely.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction to consider this matter.<sup>32</sup>

2. The Department through Scott County Child Care Licensing gave proper and timely notice of the hearing and complied with all procedural requirements of law and rule.

3. Pursuant to Minn. Stat. § 245A.08, subd. 3, the Department may demonstrate reasonable cause for the action taken by submitting evidence to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Department demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the Department alleges the license holder violated, at the time that the Department alleges that the violations of law or rules occurred.

4. A "substitute" is an adult at least 18 years of age who assumes the responsibility of the provider in the provider's absence.<sup>33</sup> A "helper" is defined as a person between 13 and 18 years of age who assists the child care provider.<sup>34</sup> A "caregiver" is a provider, substitute, helper or another adult giving care in the residence.<sup>35</sup>

5. The Commissioner may issue a fine of \$200 for each failure to comply with the background study requirements under Chapter 245C.<sup>36</sup> A background study is required for any person who is a current or prospective employee of the license holder and will have direct contact with the persons served by the program.<sup>37</sup> A background study is not required for a student or volunteer who works under the direct supervision of a person who has completed the background check.<sup>38</sup> On March 25, 2009, the Respondent's daughter, Tammy, was working as the substitute and had a completed background study. Tammy was assisted by the Respondent's niece, Katie, who served as a "helper." The Department demonstrated reasonable cause to support its determination that Katie was required to have a completed background study because she was in direct contact with the children served by the program. The

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<sup>32</sup> Minn. Stat. §§ 245A.07, subd. 3; 245A.08, subd. 2a (a); 14.50.

<sup>33</sup> Minn. R. 9502.0315, subp. 29.

<sup>34</sup> Minn. R. 9502.0315, subp. 14.

<sup>35</sup> Minn. R. 9501.0315, subp. 6.

<sup>36</sup> Minn. Stat. § 245A.07, subd. 3 (c)(4).

<sup>37</sup> Minn. Stat. § 245C.03, subd. 1 (a)(3).

<sup>38</sup> Minn. Stat. § 245C.03, subd. 1 (a)(4).

Respondent failed to offer any evidence that Katie was a student or volunteer on that date.

6. License holders must document that staff persons, caregivers and helpers have been instructed on SIDS and SBS before they assist in the care of infants.<sup>39</sup> The Commissioner may issue a fine of \$200 for violation of a law or rule governing matters of health safety or supervision.<sup>40</sup> The Department demonstrated reasonable cause to conclude that the Respondent's husband met the definition of a caregiver, that Respondent's daughter, Tammy, met the definition of a substitute, and that Respondent's niece, Katie, met the definition of a helper, and that none of them had completed SIDS/SBS training. The Respondent failed to show that she had fully complied with the applicable statute and rules.

7. If the Commissioner finds that a license holder has failed to comply with applicable law or rule and the failure does not imminently endanger the health, safety, or rights of the persons served by the program, the Commissioner may issue an order of conditional license. When issuing a conditional license, the Commissioner "shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program."<sup>41</sup>

8. The Department demonstrated by a preponderance of the evidence that, in addition to the violations for failure to complete a background check and document SIDS/SBS training, the Respondent failed to comply with the capacity and age distributions requirements of her license, that she exceeded the limitations on more than one occasion, and that on one occasion she far exceeded the limitation on the number of children under two years of age. The Department demonstrated that a conditional license is warranted because, although these violations did not place the children served by the program in imminent danger, they did place the children at risk.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Administrative Law Judge recommends that:

1. The Order to Forfeit a Fine of \$800 be AFFIRMED.

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<sup>39</sup> Minn. Stat. § 245A.50, subd. 5 (amended, Laws of 2009, ch. 142, Art. 1, § 21).

<sup>40</sup> Minn. Stat. § 245A.07, subd. 3 (c)(4).

<sup>41</sup> Minn. Stat. § 245A.06, subd. 1.



2. The Order of Conditional License be AFFIRMED.

Dated: October 13, 2009

s/Beverly Jones Heydinger

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Beverly Jones Heydinger  
Administrative Law Judge

Reported: Digitally Recorded  
A-bjh-10012009 (not transcribed)

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Cal Ludeman, Department of Human Services, PO Box 64998, St. Paul, MN 55164-0998 or 540 Cedar Street, St. Paul, MN 55164, telephone number 651-431-2907, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

### **MEMORANDUM**

The Respondent did not dispute that she had exceeded her licensed capacity and age distribution and that a Conditional License may be appropriate. She offered assurance that she will remain within the limits of her license.

The Respondent strenuously objected to the size of the fine because she believes that it is disproportionate to the seriousness of the offense. In particular, since Katie was only a helper and was working with two others who had completed the background check, to issue two fines, for both the failure to have the background study and the SIDS/SBS training, seemed excessively punitive. No background check would have been required if Katie was a student or volunteered to provide assistance, but the Respondent offered no evidence to support that conclusion. Nonetheless, since a student or volunteer is permitted to assist without a background study, these facts may be considered in determining whether one fine would be sufficient.

The Department failed to show that the Respondent's husband met the definition of a substitute, as stated in the Order to Forfeit a Fine, because there was no evidence that he assumed responsibility in the provider's absence. However, there was sufficient evidence that he met the definition of a caregiver. The Department demonstrated that the husband had helped to give care during the winter. Based on the roster attached to Exhibit 4, it was unreasonable to assume that an infant was present when the husband was providing care, and the Respondent failed to offer any evidence to rebut the Department's evidence of reasonable cause for this violation. However, there was no direct evidence that an infant was present when the husband was assisting.

In light of the facts, the Department may wish to reconsider whether two fines for Katie's lack of background check and training, as well as a fine for the husband, were appropriate. It may also wish to consider whether the Respondent should be given the opportunity to work out a payment schedule.

**B. J. H.**